No. 87-1644

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

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Continental Electric Company, an Alabama corporation; and Randolph Hall, Gaddis Hall and Robert Allen, individually and as co-partners in the partnership doing business as R G & B Leasing,

Petitioners,

v.

American Employers' Insurance Company,

Respondent.

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

—o—

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QUESTION PRESENTED

1. Whether the United States Supreme Court has jurisdiction to entertain the Petition for Writ of Certiorari as no Federal Questions were presented to or passed upon by the Alabama Supreme Court.

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OPINION BELOW

Petitioners' statement of the Opinion Below is sufficient.

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JURISDICTION

The United States Supreme Court is without jurisdiction under 28 U.S.C. 1257(3). The Federal Questions raised in the Petition for Writ of Certiorari were neither set forth for consideration to the Alabama Supreme Court nor ruled upon by that Court.

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CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

28 U.S.C. § 1257 (1964) provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By Writ of Certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held by authority exercised under, the United States. 28 U.S.C. § 1257 (1964).

Supreme Court Rule 21.1(h) provides in pertinent part:

> If review of the judgment of a state court is sought, then the statement of the case shall also specify the

> stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner in raising them and the way in which they were passed upon by the court; such pertinent quotation or specific portions of the record, or a summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari. Sup. Ct. R. 21.1(h) (1980).

Otherwise, Petitioners' statement of Constitutional, Statutory and Other Provisions Involved is sufficient.

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STATEMENT OF THE CASE

Petitioners' statement is sufficient except insofar as Petitioners claim that the Federal Questions raised in the Petition for Writ of Certiorari were presented to the Alabama Supreme Court and ruled upon thereby. Petitioners' claims concerning the denial of due process of law as required by the Constitution of the United States were never raised. Furthermore, all references to trial by jury in the Alabama State court proceedings and Alabama Supreme Court opinion were made with regard to Alabama's summary judgment rule, Rule 56, Alabama Rules of Civil Procedure. At no time was this respondent or the Supreme Court of Alabama aware that Federal Questions were being raised by the Petitioners.

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ARGUMENT

The Petition for Writ of Certiorari must be denied because no Federal Question was presented to or passed upon by the Alabama Supreme Court.

Continental Electric Company's Petition for Writ of Certiorari should be denied because the Court is without jurisdiction to entertain the questions set forth in the Petition. Petitioners have failed to raise a Federal Question in the Alabama State court proceedings. Furthermore, the Alabama Supreme Court has failed to pass upon a Federal Question in its decision in this case.

The Supreme Court's jurisdiction over final judgments rendered by state courts is set forth in 28 U.S.C. § 1257 as follows:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By Writ of Certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held by authority exercised under, the United States. 28 U.S.C. § 1257 (1964).

This Court has considered on many occasions whether a Federal Question was "specially set up or claimed" and has stated that "[i]t is a long settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493 (1981). The Supreme

Court further requires in its rule of procedure 21.1(h) as follows:

> If review of the judgment of a state court is sought, then the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner in raising them and the way in which they were passed upon by the court; such pertinent quotation or specific portions of the record, or a summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari. Sup. Ct. R. 21.1(h)(1980).

The record of proceedings in the Alabama state court does not "expressly or by clear implication" show that a federal claim was presented to the state court. Nor, have petitioners amply set forth in their Petition for Writ of Certiorari the presentation of such a federal question and ruling thereon by the Alabama Supreme Court.

Petitioners' asserted ground for Writ of Certiorari is the denial of due process of law as required by the Fourteenth Amendment of the United States Constitution. Petitioners further claim that such denial of due process arises from the Alabama Supreme Court's failure to follow established standards of appellate review, and also the Alabama Supreme Court's denial of a trial by jury as required by the Alabama and United States Constitutions. In Petitioners' statement of the case in their Petition for Writ of Certiorari, the only reference to due process claims being raised in the state court proceedings are as follows:

> "With respect to the issue raised herein pertaining to whether Continental was denied due process of law by the Alabama Supreme Court's failure to follow established standards of appellate review, Continental expressly presented that issue to the Alabama Supreme Court in its application for re-hearing with supporting brief. (See pages in Appendix F, infra.) That issue was ruled upon by the Alabama Supreme Court's general order overruling Continental's application for re-hearing."

Petition for Writ of Certiorari, pg. 6.

A review of Petitioners' Appendix F reveals no express presentation of the issue of denial of due process under the Fourteenth Amendment. In fact, Petitioners argue only the standard of review required by Alabama Rule of Civil Procedure 56(c), which provides that a summary "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Ala.R.Civ.P. 56(c) (1987). The entire record of the state court proceeding, including Petitioners' briefs and the Alabama Supreme Court decision, is completely devoid of any mention or ruling upon the issue of denial of due process of law under the Fourteenth Amendment.

Even if Petitioners had raised expressly their due process claims in its application for re-hearing to the Alabama Supreme Court, constitutional issues raised for the first time in a petition for re-hearing; when such petition is denied without reasons given, come too late for review by the U.S. Supreme Court. *Citizen's National Bank v.*

Durr, 257 U.S. 99 (1921). Petitioners' application for rehearing was in fact denied without reasons therefor by the Alabama Supreme Court. See, Petition for Writ of Certiorari, Appendix B, p. A-12.

Petitioners have also claimed that the denial of trial by jury has given rise to denial of due process of law. The state court record is clear that all references to trial by jury were given with regard to Alabama's summary judgment rule and "scintilla rule." The "scintilla rule" provides the test as to whether there is a "genuine issue as to any material fact" which will prevent entry of summary judgment. *Wilson v. Birmingham Post Co.*, 482 So.2d 1209 (Ala. 1986). The Alabama Supreme Court understood the arguments to be framed around only Alabama rules as evidenced by the following excerpt from the Alabama Supreme Court decision wherein the court reversed summary judgment on whether an agency relationship existed between American Employers and Mr. John Creel:

> We do hold that the evidence, viewed in the light most favorable to Continental, and under *our* scintilla rule, creates a genuine issue of material fact, on the following three issues and these matters are to be resolved by a trier of fact. *Continental Electric Company v. American Employers Ins. Co.*, — So.2d — (1987) (Petition for Writ of Certiorari to the Alabama Supreme Court, Appendix A, p. A-7.) (emphasis added.)

Furthermore, in Petitioners' brief on appeal to the Supreme Court of Alabama, their statement of issues presented clearly shows that only Alabama law was set forth for review. *See*, Appendix A. Petitioners only set forth Alabama cases in support of their issues presented and raised no Federal Questions in connection therewith.

Petitioners also claim to have raised the issues of the denial of a jury trial as giving rise to denial of due process as required by the Constitution in their application for re-hearing. A review of Petitioners' issues presented and actual argument in their application for re-hearing reveal that no Federal Questions were raised or argued. See, Appendix "B" and "C".

Furthermore, even if Petitioners had raised the Federal Questions in their application for re-hearing, as noted earlier, this comes too late when the state court passes on the application for re-hearing only by denial thereof without an opinion. *Citizen's National Bank v. Durr,* 257 U.S. 99 (1921).

In *Illinois v. Gates,* 462 U.S. 213 (1983), the court identified reasons for the "not pressed or passed upon" rule. The court stated that: "[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Id.,* 462 U.S. at 221, citing *Cardinale v. Louisiana,* 394 U.S. 437 (1969). In this case, the record is clearly inadequate as to any Federal Question because such was not in the mind of the parties when the record was compiled. Furthermore, "failure of the highest court of a state to pass on a Federal Question is assumed to be due to want of proper presentation in the state court unless the aggrieved party can show affirmatively to the contrary." *Webb v. Webb,* 451 U.S. 493 (1981). The court also set forth comity reasons which arise out of the "due regard for the appropriate relationship of the Supreme Court to the state courts", thus allowing a state court

"to rest its decision on an adequate and independent state ground". *Illinois v. Gates*, 462 U.S. at 222.

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CONCLUSION

The only possible Federal Questions in the Alabama state court proceedings must be drawn by extreme inference. This Court has stated that "[a]t the minimum, however, there should be no doubt from the record that a claim under [a] federal statute or the *Federal Constitution* was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. at 501. The Supreme Court should deny Continental Electric Company's Petition for Writ of Certiorari because Federal Questions were not raised, the Alabama Supreme Court was not apprised of the Federal Questions, and the Alabama Supreme Court did not pass upon such alleged Federal Questions.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

STATEMENTS OF ISSUES PRESENTED

1. Did the trial court err when it rendered summary judgment on Continental's claim against American for breach of contract when the appeal record showed that a scintilla of evidence existed to prove such claim?

Wilson v. Liberty National Life Ins. Co.,
331 So.2d 617.

Hartford Accident and Indemnity Co.,
308 So.2d 695.

2. Did the trial court err when it rendered summary judgment on Continental's claim against American for fraud when the appeal record showed that a scintilla of evidence existed to prove such claim?

Continental Assurance Co. v. Kountz,
461 So.2d 502.

Burt v. Commercial Union Ins. Co.,
489 So.2d 547.

3. Did the trial court err when it rendered summary judgment on Continental's claim against American for declaratory judgment relief when the appeal record showed that a scintilla of evidence existed to prove such claim?

Antram v. Stuyvesant Life Ins. Co.,
287 So.2d 837.

4. Did the trial court err when it rendered summary judgment on Continental's claim against American for

bad faith when the appeal record showed that a scintilla of evidence existed to prove such claim?

Gulf Atlantic Life Ins. Co. v. Barnes,
405 So.2d 916.

Aetna Life Insurance Co. v. Lavoie,
470 So.2d 1060.

5. Did the trial court err when it rendered summary judgment on Continental's claim against American for negligence when the appeal record showed that a scintilla of evidence existed to prove such claim?

Alabama Farm Bureau Mutual Casualty Ins. Co. v. Haynes, 497 So.2d 82.

6. Did the trial court err when it rendered summary judgment on Continental's claim against American for breach of contract to insure when the appeal record showed that a scintilla of evidence existed to prove such claim?

Alabama Farm Bureau Mutual Casualty Ins. Co. v. Haynes, 497 So.2d 82.

APPENDIX "B"

STATEMENT OF ISSUES PRESENTED

3. Was the term "equipment" in the insurance contract ambiguous such that Continental is entitled to a jury trial on the issue of the meaning of that term?

Hill Air of Gadsden, Inc. v. City of Gadsden,
467 So.2d 230.

National Casualty Company v. Thompson,
96 So.2d 708.

4. Was Continental entitled to a jury trial on its cause of action for bad faith against American, if the term "equipment" is determined to be ambiguous?

Sparks v. Republic National Life Ins. Co.,
647 P.2d 1127.

Continental Ins. Co. v. Kountz.
461 So.2d 802.

APPENDIX "C"

IV. ARGUMENT

ARGUMENT "A"

3.) *The Term "Equipment" In The Insurance Agreement Was Ambiguous.*

There are numerous cases in which this Court has determined that contractual terms, far more ambiguous than the term "equipment", were ambiguous as a matter of law, thereby preventing the entry of a summary judgment. See: *Hill Air of Gadsden, Inc. v. City of Gadsden,* 467 So.2d 230, (meaning of lease provision concerning "instrument equipped" and "licensed by the FAA"); *Pierce-Dickerson Bonding Company v. Southern Guarantee Ins. Co.,* Oct. Term 1986-87, Case Number 85-723, 21 ABR 2063, 2/20/87 (meaning of " . . . use of the insured premise and all operations necessary or incident thereto"); *Flemming v. Alabama Farm Bureau Mutual Casualty Ins. Co.,* 310 So.2d 200; (meaning of "any member of the family of the insured residing in the same household as the insured"); *National Casualty Co. v. Thompson,* 96 So.2d 708 (meaning of "automobile"); *Lee v. Clark and Associates Real Estate, Inc.,* October term, 1986-87, Case Number 85-389, 21 ABR 2418 3/27/87 (construction of a release provision); See also the Arizona Supreme Court's decision in *Sparks v. Republic National Life Ins. Co.,* 647 P.2d 1127 (1982).

Also, if the term "equipment" was not ambiguous, why was it necessary for the trial court to review the affidavits, as stated by this Court in its decision at the top of page 5 of its decision. If the trial court must refer to matters extrinsic to the insurance agreement to determine the meaning of a contractual term, then the term is clearly

ambiguous and the case is due to be decided by a jury *and* not as a matter of law by summary judgment.

The insurance agreement also involves a term which, on its face, is not only ambiguous, but also, in application, that term became ambiguous by reason of a latent ambiguity. This Court, in *Mass Appraisal Services, Inc. v. Carmichael,* 404 So.2d 666,673, by quoting *Gibson v. Anderson,* 265 Ala. 553, 92 So.2d 692, stated:

> . . . It is said that latent ambiguity arises when the writing on its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain,' 32 C.J.S., Evidence, [section] 961b, p.915; 'that is, an uncertainty that does not appear on the face of the instrument, but which is shown to exist for the first time by matter outside the writing', 20 Am.Jur., Evidence, [section] 1157, p. 1010. And it is well established that partial or other extrinsic evidence is admissible to explain or clarify a latent ambiguity."

This Court in the *Carmichael* case, held that the terms of that contract involved a latent ambiguity and, for that reason, held that the trial court properly determined that the contract was ambiguous as a matter of law. Reasoning by analogy compels the same conclusion of ambiguity with respect to the term "equipment" in this case.

This Court in *Grimes v. Massey Ferguson, Inc.,* 355 So.2d 338, specifically found that the term "equipment" was ambiguous. Unlike this case, this Court, in the *Grimes* case, had far more available material to refer to in the statute as a whole, in order to determine the meaning of the term "equipment". It necessarily follows that the

term "equipment" in this case is far more ambiguous than the term "equipment" in the *Grimes* case. For that reason, American was not entitled to a summary judgment on Continental's the breach of contract claim, which is the subject of Continental's Application for Rehearing.

ARGUMENT C

(Bad Faith)

This Court, in its judgment, expressed that since the term "equipment" did not include the display samples, a "debatable reason" existed for American to refuse to pay Continental's claims and, therefore, the summary judgment in favor of American on Continental's bad faith claim was proper.

That decision was clearly premised upon the grounds that the term "equipment" did not include within its meaning the display samples and, based upon such premise, Continental was not entitled to a directed verdict on its contract claim. As shown above, such premise was unsound.

If this Court should hereinafter decide that the display samples are "equipment", then the summary judgment on Continental's bad faith clearly was improper and is due to be reversed.

Also, if this Court should agree with Continental's alternative argument that the term "equipment" is ambiguous, then the summary judgment rendered by trial court on Continental's bad faith claim is still due to be reversed. The Arizona Supreme Court in *Sparks v. Republic National Life Ins. Co., supra,* in considering a fact

situation similar to that in this case, said at 647 P.2d 1127, 1137:

> "We disagree with the defendants' contention that an insurer's belief that a portion of its insurance contract precludes coverage raises an absolute defense to a claim of bad faith. If the insurer's interpretation of its own contract as excluding coverage could render an insurer's claim 'fairly debatable' then insurers would be encouraged to write ambiguous insurance contracts, secure in the knowledge that an obscure portion of the policy would provide an absolute defense to a claim for bad faith. Although the insurer's belief that the validity of insured's claim was fairly debatable is a defense to a charge of bad faith, such a belief is a question of fact to be determined by the jury."

The *Sparks* decision is abiding authority supporting Continental's contention that American was not entitled to a summary judgment on Continental's bad faith claim, even if the term "equipment" is found to be ambiguous.

Further, this Court in *Continental Ins. Co. v. Kountz*, 461 So.2d 802; *Nationwide Mutual Ins. Co. v. Clay*, 469 So.2d 553; and *Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060, after remand from the United States Supreme Court, at Case No. 82-426 and 82-1152, Supreme Court of Alabama, October term 1986-1987 (3/27/1987) made it clear that the directed verdict test was not applicable where the facts show that an insurance company blatantly and intentionally failed to determine the existence of valid reason for it's denial of an insurance claim. The United States Supreme Court on the appeal of the *Lavoie* case, *supra* at — U.S. —, 106 S.Ct. 1580, 89 L.Ed.2d 823, 829, interpreted the previous opinion of this Court with respect to

the directed verdict test by stating that the Alabama Supreme Court "interpreted" its prior opinions as not requiring dismissal of a bad-faith refused-to-pay claims even when a directed verdict against the insurer on the underlying claim was impossible.

The evidence indicates substantial evidence that American intentionally failed to determine if there was a valid reason for denal of Continental's claims for damages to the display samples. (See pgs. 42-44 of Continental's original brief on this appeal) American, therefore, was not entitled to a summary judgment on Continental's bad faith claim.